(18,869.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 641.

SOLOMON L. SWARTS, TRUSTEE IN BANKRUPTCY OF SIEGEL-HILLMAN DRY GOODS COMPANY, APPELLANT,

vs.

L. F. HAMMER, JR., COLLECTOR OF THE REVENUES OF THE CITY OF ST. LOUIS, MISSOURI.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from United States circuit court of appeals	*a*	1
Citation and waiver of service	1	1
Transcript from district court	1	2
Certificate of the referee	2	2
Opinion of the referee	3	3
Petition of trustee for review	4	4
Decree approving finding of referee, June 25, 1902	5	5
Petition for and order allowing appeal	6	6
Assignment of errors	7	6
Clerk's certificate to transcript	8	7
Appearance for appellant	9	8
Appearance for appellee	9	8
Order of submission	10	9
Opinion	11	10
Decree	13	11
Petition for certificate, etc	14	11
Citation and admission of service	17	13
Clerk's certificate to transcript	18	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 27, 1903.

a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1902, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit: the first day of December, A. D. 1902, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the twelfth day of August, A. D. 1902, a transcript of record, pursuant to an appeal allowed by the district court of the United States for the eastern district of Missouri, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein Solomon L. Swarts, trustee in bankruptcy of Siegel-Hillman Dry Goods Company, was appellant, and L. F. Hammer, Jr., collector, &c., was appellee, which said transcript of record is in the words and figures following, to wit:

1 The United States of America to L. F. Hammer, Jr., collector, &c., Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the district court of the United States for the eastern division of the eastern judicial district of Missouri, wherein Solomon L. Swarts, trustee in bankruptcy of Seigel-Hillman Dry Goods Company, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Elmer B. Adams, judge of the district court of the United States for the eastern district of Missouri, this 27th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

ELMER B. ADAMS,
Judge of the District Court of the United States for the Eastern District of Missouri.

Service of citation waived and appearance entered.

JOHNSON, HOUTS, MARLATT & HAWES,
Att'ys for Hammer.

No. 198. United States district court, eastern district of Missouri. L. F. Hammer, Jr., collector, *vs.* Solomon L. Swarts, trustee in bankruptcy, &c. Citation on appeal. Filed 27th June, 1902. Wm. Morgan, clerk.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the District Court of the United States in and for the Eastern Division of said Judicial District.

In the Matter of SIEGEL-HILLMAN DRY GOODS COMPANY, Bankrupt. In Bankruptcy. At St. Louis, in said District.

Be it remembered, that on the 19th day of June, A. D. 1902, there was filed in the office of the clerk of said court a certificate of question of Walter D. Coles, Esquire, referee in bankruptcy, arising upon the petition of L. F. Hammer, Jr., collector of the city of St. Louis, certified to the judge of this court for his opinion thereon, which certificate is in the words and figures following, to wit:

2

" In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In the Matter of SIEGEL-HILLMAN DRY GOODS COMPANY, Bankrupt. In Bankruptcy. No. 198.

I, Walter D. Coles, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose, pertinent to the said proceedings:

The Siegel-Hillman Dry Goods Company was adjudged bankrupt on February 8, 1900; and, thereafter, on March 8, 1900, Solomon L. Swarts was elected and qualified as trustee of the bankrupt estate. On the 1st of June, 1900, said Swarts, as such trustee, had in his hands, and on deposit in the designated depositary, the sum of $68320.00 in money, belonging to the bankrupt estate. On February 24, 1902, L. F. Hammer, Jr., collector of the revenue for the city of St. Louis, filed before the referee, a petition alleging that State, school and city taxes for the year 1901, had been regularly assessed against the property in the possession of said trustee on the 1st day of June, 1900, said property being said sum of $68320.00 in money before mentioned, and that a tax bill for said taxes, properly certified, had been delivered to said collector for collection, and prayed that the referee make an order, directing the trustee to pay him the sum of $1298.08, the amount of said tax bill, together with the accrued penalties, commissions and fees, as provided by law. The trustee, thereafter, on February 24, 1902, filed an answer to the petition of the collector, denying that the taxes, sought to be collected

by the petitioner, were a legal and proper charge against the trustee or that the same ought to be paid by said trustee out of the funds of the estate in his hands. The matter came on to be heard before the referee, pursuant to notice to the parties, on March 4, 1902, and, thereafter, on June 16, 1902, the referee made an order directing that the trustee pay to the petitioner the sum of $1298.08, the amount of said tax bill for the year 1901, together with the accrued penalties and fees provided by law.

Thereafter, on June 17, the trustee filed a petition (hereto attached) praying that the referee certify to the judge for his opinion thereon, the foregoing order, which is done accordingly.

WALTER D. COLES,
Referee in Bankruptcy."

3 "*Opinion of Referee.*

The petition of the collector in this case presents the general question whether property in the hands of a trustee in bankruptcy is subject to taxation under the statutes of this State. I have carefully considered the briefs of counsel, the relevant provisions of the statutes, and the pertinent cases, and have reached the following conclusions:

1. A trustee in bankrupt is, by virtue of the provisions of the bankrupt law, (section 70), vested with plenary title to all the property of the bankrupt, not declared to be exempt. The fact that the trustee holds such title in trust for the purposes declared in the act, does not in any way impair his title and such title is complete and effectual as against all the world. Until a dividend is declared, or a distribution ordered, no creditor of the bankrupt estate has any title attaching to the whole or to any part of the property in the possession of the trustee; and a creditor having an allowed claim, cannot properly be considered the owner of an undivided interest therein. Until a distribution is ordered, the right of a creditor is limited to securing compliance, on the part of the trustee, with the provisions of the act, regulating the administration and distribution of the estate.

2. The property of a bankrupt estate in the hands of a trustee in bankruptcy, is 'under the care, charge and management' of such trustee, within the meaning of section 9144 Revised Statutes of Missouri 1899, and it is therefore the duty of such trustee to make return of such property for purposes of taxation. The foregoing conclusion seems to follow necessarily, from the fact that the trustee has title to the property of the bankrupt estate, and is charged by law with the custody, preservation and management thereof. The mere fact that the bankrupt law imposes certain restrictions upon the trustee's right to deal with the property, and throws certain safeguards around his right to control it, does not impair or invalidate the foregoing conclusion. (State *vs.* Burr, 143 Mo. 209.)

3. While section 64*a* of the bankrupt law seems to relate solely to taxes 'due and owing by the bankrupt,' prior to bankruptcy, section 64*b* provides for the payment in full out of the bankrupt

estate of the 'actual and necessary costs of preserving the estate subsequent to filing the petition.' The latter provision is of a very comprehensive character, and was unquestionably intended to provide for the payment of all proper expenses and charges incident to the continued existence and preservation of the assets of
4 the estate. Property in the hands of a trustee in bankruptcy is embraced within the terms of the State statutes imposing taxes, and I can see nothing in the policy or purposes of the bankrupt law, which would justify the conclusion that Congress intended that such property should be held exempt from the burden of State taxation.

4. To impose upon trustees in bankruptcy the duty of making returns and of paying current taxes will certainly tend to obstruct and prolong the administration of bankrupt estates, but that fact does not justify the conclusion that such trustees are not obliged to pay taxes. Where the law clearly imposes the duty of paying taxes, the delay and inconvenience resulting from compliance with the law, is no excuse for non-compliance, and the 'argument from convenience' has no application in such a case.

5. So far as there have been any adjudications upon the question, the conclusions reached are in conformity to the foregoing views. *In re* Cornheim, 100 Fed. 268, 4 American Bankruptcy Reports, 58; *In re* Kellar, 109 Fed. 131, 6 American Bankruptcy Reports, 351.

In accordance with the foregoing views, the petition of the collector is sustained, and the trustee is ordered to pay the petitioner the sum of $1298.08, together with the accrued penalties, and the fees, provided by law."

"In the District Court of the United States for the Eastern Divison of the Eastern Judicial District of Missouri.

In the Matter of SIEGEL-HILLMAN DRY GOODS CO., Bankrupt. In Bankruptcy. No. 198.

Now comes Solomon L. Swarts, trustee herein, and petitions the referee to certify for review by the United States district court for the eastern division of the eastern judicial district of Missouri, or by the judge thereof, in accordance with the law and general orders in bankruptcy in such cases made and provided, the order of the referee entered herein on the 16th day of June, 1902, directing the trustee to pay to L. F. Hammer Jr., collector of the revenue of the city of St. Louis, Missouri, the sum of twelve hundred and ninety-eight and 8/100 dollars ($1298.08) together with the accrued penalties and the fees provided by law.

And the trustee prays the referee to certify to the court aforesaid, or to the judge thereof, the questions presented, with the evidence relating thereto.

5 And as grounds for such review of the said order the trustee alleges that the referee erred in the following respects:

First. In his decision that funds of a bankrupt estate while in process of administration by the United States district court in bank-

ruptcy are subject to taxation by the State of Missouri in the city of St. Louis.

Second. In directing and ordering the trustee to pay to the collector of the revenue for the city of St. Louis the sum of twelve hundred and ninety-eight and 8/100 dollars ($1298.08) together with the accrued penalties and the fees as provided by law.

Third. In deciding that the funds of a bankrupt estate while in process of administration by the United States district court in bankruptcy are in the custody, charge or control of the trustee in bankruptcy.

Fourth. In not holding that the funds of a bankrupt estate while in process of administration by the United States district court in bankruptcy are in the custody of the law, and are under the control and charge of the United States district court in bankruptcy having charge of the estate, and in not holding that such funds are not subject to taxation by the State.

SOLOMON L. SWARTS, *Trustee*,
By SALE & SALE, *His Attorneys.*"

Indorsed: No. 198. *In re* Siegel-Hillman Dry Goods Co., bankrupt. Question arising upon petition of L. F. Hammer, Jr., collector, certified to judge for his opinion thereon. Filed June 19, 1902. Wm. Morgan, clerk.

And afterwards, to wit, on the 25th day of June, A. D. 1902, said question was heard by and submitted to the court on the finding of said referee and the court having considered said report and being fully advised thereof:

"It is ordered that the finding of the referee ordering the trustee to pay to L. F. Hammer, collector of the city of St. Louis the sum of twelve hundred ninety-eight dollars and eight cents ($1298.08), the amount of taxes assessed against said trustee for the year A. D. 1901, be and the same is approved; and that so much of the finding of said referee, ordering the trustee to pay the accrued penalties and fee as provided by law, be and the same is hereby disapproved.

It is therefore now ordered that Solomon L. Swarts, trustee of said estate, pay to L. F. Hammer, collector of the revenue for the
6 city of St. Louis, the said sum of twelve hundred ninety-eight dollars and eight cents ($1298.08), the amount of taxes found to be due as aforesaid."

Indorsed: United States district court, eastern division of the eastern judicial district of Missouri. In bankruptcy. In the matter of Siegel-Hillman Dry Goods Company, bankrupt. Order on report of referee as special master on claim of L. F. Hammer, collector, &c. Filed 25th June, 1902. Wm. Morgan, clerk.

And afterwards, to wit, on the 27th day of June, A. D. 1902, there was filed in the office of the clerk of said district court, in said cause, a petition for appeal, which petition is in the words and figures following, to wit:

"In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In the Matter of SIEGEL-HILLMAN DRY GOODS CO., Bankrupt. In Bankruptcy. No. 198.

In re Claim of L. F. HAMMER, JR., Collector of the Revenue for the City of St. Louis.

Solomon L. Swarts, trustee of the Siegel-Hillman Dry Goods Company, bankrupt, conceiving himself aggrieved by the decree made and entered on the 25th day of June, 1902, in the above-entitled matter, does hereby appeal from said order and decree to the United States circuit court of appeals for the eighth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for said circuit.

Dated St. Louis, Missouri, June 27, 1902.

SALE & SALE,
Attorneys for Solomon L. Swarts, Trustee.

The foregoing claim of appeal is allowed.

ELMER B. ADAMS,
District Judge."

Indorsed: In dist. court U. S., E. D. of E. D. of Missouri. No. 198. *In re* Siegel-Hillman Dry Goods Co., bankrupt. *In re* claim L. F. Hammer, Jr., for taxes. Petition for appeal. Filed Jun- 27, 1902. Wm. Morgan, clerk.

7 And on the 28th day of June, A. D. 1902, there was filed in said clerk's office, an assignment of errors in said cause in the words and figures following, to wit:

"In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

In the Matter of SIEGEL-HILLMAN DRY GOODS CO., Bankrupt. In Bankruptcy. No. 198.

In re Claim of L. F. HAMMER, JR., Collector of the Revenue for the City of St. Louis.

Assignment of Errors.

Now on the 27th day of June, 1902, comes the said Solomon L. Swarts, trustee in bankruptcy of Siegel-Hillman Dry Goods Company, by Sale & Sale, his attorneys, and says that the decree in said cause is erroneous and against the just rights of said trustee, for the following reasons:

First. Because the court erred in approving the decision of the referee herein that the funds of a bankrupt estate while in process of administration by the United States district court in bankruptcy are subject to taxation by the State of Missouri and the city of St. Louis.

Second. Because the court erred in directing and ordering the trustee to pay the collector of the revenue for the city of St. Louis the sum of twelve hundred and ninety-eight and $\frac{8}{100}$ dollars (1298.08).

Third. Because the court erred in its decision that the funds of a bankrupt estate while in process of administration by the United States district court are subject to taxation under the laws of the State of Missouri and the bankruptcy law of 1898.

Fourth. Because the court erred in not holding that the funds of a bankrupt estate while in process of administration by the United States district court in bankruptcy are not taxable or assessable for taxation under the laws of the State.

Fifth. Because the court erred in allowing the claim of L. F. Hammer, Jr., collector of the revenue for the city of St. Louis, for taxes for the year 1901.

Wherefore, the said Solomon L. Swarts, trustee prays that said decree may be reversed, and said court may be directed to enter a decree in accordance with the law and the facts as shown by
8 a transcript of the record, proceedings and papers upon which the decree complained of was rendered.

SALE & SALE,
Solicitors for Solomon L. Swarts, Trustee."

Endorsed: In district court of United States for E. D. of E. D. of Missouri. No. 198. *In re* Siegel-Hillman Dry Goods Co., bankrupt. *In re* claim of L. F. Hammer, Jr., for taxes. Assignment of errors. Filed Jun- 28, 1902. Wm. Morgan, clerk.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the District Court of the United States in and for the Eastern Division of said Judicial District.

I, William Morgan, clerk of the district court of the United States, in and for the eastern division of the eastern judicial district of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the pleadings filed and proceedings had on the petition of L. F. Hammer, Jr., collector of the revenue for the city of St. Louis, for an order on the trustee to pay a certain tax bill, together with accrued penalties commissions and fees, in the matter of Siegel-Hillman Dry Goods Company, bankrupt, No. 198 in bankruptcy, as the same remain on file and of record in my office.

I do further certify, that the original citation filed in said cause, with the acknowledgment of service endorsed thereon, is hereto attached and herewith returned.

In testimony whereof, I have hereunto set my hand and affixed the seal of said district court of the United States, in and for said division of said district, at office in the city of St. Louis, Missouri, this 21st day of July, A. D. 1902.

{ Seal of the United States District Court, Eastern Division of the Eastern Judicial District of Missouri. }

WM. MORGAN,
Clerk of the U. S. District Court, St. Louis, Mo.

Filed Aug. 12, 1902.

JOHN D. JORDAN, *Clerk.*

9 (*Appearance for Appellant.*)

And on the sixteenth day of January, A. D. 1903, an appearance of counsel for appellant was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

SOLOMON L. SWARTS, Trustee in Bankruptcy of Siegel-Hillman Dry Goods Co., Appellant,
vs.
L. F. HAMMER, JR., Collector, &c. } No. 1806.

The clerk will enter our appearance as counsel for the appellant.

M. N. SALE.
LEE SALE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1806. Solomon L. Swarts, trustee, etc., appellant, *vs.* L. F. Hammer, Jr., collector, &c. Appearance. Filed Jan. 16, 1903. John D. Jordan, clerk. M. N. Sale, Lee Sale, counsel for appellant.

(*Appearance for Appellee.*)

And on the seventh day of October, A. D. 1902, an appearance of counsel for the appellee was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

SOLOMON L. SWARTS, Trustee, etc., Appellant,
vs.
L. F. HAMMER, JR., Collector, etc., Appellee. } No. 1806.

The clerk will enter our appearance as counsel for the appellee.

10

GEORGE S. JOHNSON.
CHARLES A. HOUTS.
HERBERT R. MARLATT.
HARRY B. HAWES.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1806. Solomon L. Swarts, trustee, &c., appellant, *vs.* L. F. Hammer, Jr., coll'r. Appearance. Filed Oct. 7, 1902. John D. Jordan, clerk. George S. Johnson, Charles A. Houts, Herbert R. Marlatt, Harry B. Hawes, counsel for appellee.

(*Order of Submission.*)

And on the twelfth day of December, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1902.

MONDAY, *January* 12, 1903.

SOLOMON L. SWARTS, Trustee, &c., Appellant,
vs.
L. F. HAMMER, JR., Collector, &c. } No. 1806.

Appeal from the district court of the United States for the eastern district of Missouri.

This cause having been called for hearing in its regular order, the same was argued by Mr. Lee Sale in behalf of the appellant.

Thereupon the cause was submitted to the court upon the transcript of record from said district court and the briefs of counsel for the respective parties filed herein.

Opinion.

And on the second day of February, A. D. 1903, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, to wit:

11 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1902.

SOLOMON L. SWARTS, Trustee in Bankruptcy of Siegel-Hillman Dry Goods Company, Appellant, *vs.* L. F. HAMMER, JR., Collector, &c., Appellee.	No. 1806. Appeal from the District Court of the United States for the Eastern District of Missouri.

Mr. Lee Sale (Mr. Moses N. Sale was with him on the brief) for appellant.

Mr. Herbert R. Marlatt, Mr. George S. Johnson, Mr. Charles A. Houts, and Mr. Harry B. Hawes submitted a brief for appellee.

Before Caldwell, Sanborn, and Thayer, circuit judges.

CALDWELL, circuit judge, delivered the opinion of the court:

Solomon L. Swarts as trustee in bankruptcy of the Siegel-Hillman Dry Goods Company had in his hands as such trustee the sum of $68,320 belonging to the bankrupt estate, which sum was deposited to the credit of the trustee in the designated depository of the court. This money was so held by the trustee at the time appointed by the law of the State for the assessment of moneys and other personal property, and was duly assessed to the trustee. The trustee refused to pay the tax on this money in his hands, claiming that the bankrupt law exempted it from taxation. The referee decided it was liable to taxation and this decision was affirmed by the district court, and the trustee appealed to this court.

The money was clearly liable to be taxed under the State law and the tax is valid and collectible unless the bankrupt act exempts it from taxation.

Exemption from taxation is never presumed. The legislative intent to exempt property from taxation must be clearly and explicitly expressed.

Whether Congress could rightfully exempt from State taxation the property of a bankrupt in the hands of a trustee in bankruptcy and otherwise subject to taxation, we need not inquire. It has
12 not attempted to do so and it is highly probable it never will.

The power of taxation as well as the power to exempt from taxation is a legislative and not a judicial function. And a bankrupt court no more than any other court can exempt from taxation property in the hands of one of its officers which is liable to taxation under the State law.

It has never been questioned but what property in the custody and control of receivers and trustees of the Federal courts was subject to taxation under the State law the same as other like property. Judson on Taxation, section 407 and cases cited.

And this applies to trustees in bankruptcy as well as receivers and trustees in other cases and proceedings in the Federal courts. It is a

grave mistake to suppose that property in the possession and custody of an officer of the Federal court, by that single fact, enjoys immunity from taxation. So far from exempting property in the custody and possession of its officers from taxation a Federal court, upon proper application, will always order and direct the payment of the taxes duly assessed on such property and treat the same as a preferred claim against the estate or fund. *Judson on Taxation*, section 541.

The decree of the district court is affirmed.

Filed February 2, 1903.

13 (*Decree.*)

And on the second day of February, A. D. 1903, in the record of the proceedings of said circuit court of appeals is a decree in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1902.

MONDAY, *February* 2, 1903.

SOLOMON L. SWARTS, Trustee in Bankruptcy of Siegel-Hillman Dry Goods Company, Appellant,
vs.
L. F. HAMMER, JR., Collector, &c. } No. 1806.

Appeal from the district court of the United States for the eastern district of Missouri.

This cause came on to be heard on the transcript of the record from the district court of the United States for the eastern district of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said district court, in this cause, be, and the same is hereby, affirmed with costs; and that L. F. Hammer, Jr., collector, &c., have and recover against Solomon L. Swarts, trustee in bankruptcy of Siegel-Hillman Dry Goods Company the sum of twenty dollars for his costs herein and have execution therefor.

February 2, 1903.

14 (*Petition for Certificate, etc.*)

And afterwards to wit: on the twenty-sixth day of February, A. D. 1903, there was filed in the clerk's office of the circuit court of appeals in said cause, the original of a petition for a certificate and the allowance of an appeal to the Supreme Court of the United States, which said petition, together with the certificate and the order allowing the appeal thereon, is in words and figures following, to wit:

Honorable David J. Brewer, associate justice of the Supreme Court of the United States:

Your petitioner, Solomon L. Swarts, respectfully represents:

That he is the trustee in bankruptcy of the Siegel-Hillman Dry Goods Company; that the Siegel-Hillman Dry Goods Company was adjudged bankrupt on February 8, 1900, and thereafter on March 8, your petitioner was elected and qualified as trustee of the bankrupt estate. On June 1, 1900, said petitioner, as such trustee, had in his hand and on deposit in the designated depository $68,320 in money belonging to the bankrupt estate. On February 24th, 1902, L. F. Hammer, Jr., as collector of the revenue, filed a petition alleging that State, school and city taxes for the year 1901 had been regularly assessed against the property in the possession of said trustee on June 1, 1900, said property being said sum of $68,320 and that a tax bill for said tax, properly certified, had been delivered to said collector for collection, and prayed for an order directing trustee to pay L. F. Hammer the sum of $1298.08, the amount of said tax bill, together with the accrued penalties, fees and commissions, as provided by the State law. Petitioner, as trustee, filed an answer denying that the taxes sought to be collected by the collector were a legal and proper charge against the trustee, or that the same ought to be paid by said trustee out of the funds of the estate in his hands. The district court ordered the trustee to pay the collector the sum of $1298.08 being the face of the tax bill, all of which facts more
15 particularly appear in the transcript of record duly certified and filed herewith.

That from the order of the district court your petitioner appealed to the circuit court of appeals for the eighth circuit and the decision of the district court was sustained by the said circuit court of appeals in an opinion delivered by Judge Caldwell which said opinion appears on pages 11 and 12 of the transcript of record filed herewith.

That the State statute under consideration provided "Every person owning or holding property on the first day of June, including all such property purchased on that day shall be liable for taxes thereon for the ensuing year."

That the brief of counsel of the appellant and the brief of the appellee are filed herewith.

That the question raised here is one likely to be raised sooner or later in every State where any person is named as trustee or where any funds are located in any designated depository and the funds of a trustee may be measurably diminished before he comes to distribute to creditors and especially is this so where the administration may be delayed for several years or where he may have to file claims in different States to recover assets due the bankrupt or where claims are disputed, and the orderly administration of a trustee may be interfered with by conflicting and debatable claims of various jurisdictions; that the bankrupt act does not in its terms give a preferred claim or any claim on assets accruing to the State, county or municipality after the adjudication in bankruptcy. The princi-

ple of *expressio unius est exclusio alterius* would seem to apply. Your petitioner only presents so much of the argument on the merits as may enable your honor to see that another circuit court of appeals construing a different State law might very well decide the question differently; that there might never be an uniform administration of the bankruptcy act until the Supreme Court of the United States finally passed upon the question.

That the section of the bankruptcy act applicable to this appeal is numbered 25 *b* 2.

16 Wherefore, your petitioner prays that your honor will certify that in your opinion the determination of the question involved in the allowance of the claim of L. F. Hammer, Jr., collector, against The Siegel-Hillman Dry Goods Company, bankrupt, is essential to a uniform construction of the bankruptcy act approved July 1st, 1898, throughout the United States and allow an appeal to the Supreme Court of the United States.

SALE & SALE,
WOLF & COHEN,
Attorneys for Petitioner.

I certify that in my opinion the determination of the questions involved in the allowance of the claim of L. F. Hammer, Jr., collector, &c., against the bankrupt estate of Siegel-Hillman Dry Goods Company is essential to a uniform construction of the bankruptcy act throughout the United States, and I hereby allow an appeal to the Supreme Court of the United States.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

February 21, 1903.

(Endorsed:) No. 1806. Solomon L. Swarts, trustee, &c., appellant, *vs.* L. F. Hammer, Jr., coll'r, &c. Petition for certificate and allowance of appeal and order allowing appeal to Supreme Court of the United States. Filed Feb. 26, 1903. John D. Jordan, clerk.

(*Citation.*)

And on the twenty-seventh day of February, A. D. 1903, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which with the admission of service endorsed thereon is hereto attached and herewith returned.

17 UNITED STATES OF AMERICA, *ss:*

To L. F. Hammer, Jr., collector of the revenue of the city of St. Louis, Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein Solomon L. Swarts, trustee in bankruptcy

of Siegel-Hillman Dry Goods Company, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 21st day of February, in the year of our Lord one thousand nine hundred and three.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Service of above citation is hereby admitted this 26th day of February, 1903.

HERBERT R. MARLATT,
GEORGE S. JOHNSON,
CHARLES A. HOUTS,
HARRY B. HAWES,
Attorneys for L. F. Hammer, Jr., Collector of the Revenue of the City of St. Louis, Missouri, Appellee.

[Endorsed:] No. 1806. Solomon L. Swarts, trustee, etc., appellant, *vs.* L. F. Hammer, Jr., collector, &c. Citation. Filed Feb. 27, 1903. John D. Jordan, clerk.

18 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing eighteen pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals, in a certain cause wherein Solomon L. Swarts, trustee in bankruptcy of Siegel-Hillman Dry Goods Company, was appellant, and L. F. Hammer, Jr., collector, &c., was appellee, No. 1806, December term, 1902, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation with the admission of service endorsed thereon is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at office in the city of St. Louis, Missouri, in the eighth circuit, this ninth day of March, A. D. 1903.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18,869. U. S. C. C. of appeals, 8th circuit. Term No. 641. Solomon L. Swarts, trustee in bankruptcy of Siegel-Hillman Dry Goods Company, appellant, *vs.* L. F. Hammer, Junior, collector of the revenue of the city of St. Louis, Missouri. Filed March 17, 1903.

Supreme Court of the United States.

OCTOBER TERM, 1902.

SOLOMON L. SWARTS, TRUSTEE IN BANKRUPTCY OF SIEGEL HILLMAN DRY GOODS COMPANY,
APPELLANT,
vs.
L. F. HAMMER, JR., COLLECTOR OF THE REVENUE OF THE CITY OF ST. LOUIS, MISSOURI.
No. 641.

STATEMENT. SPECIFICATION OF ERROR AND ARGUMENT FOR APPELLANT.

STATEMENT.

The Siegel-Hillman Dry Goods Company was adjudged bankrupt on February 8, 1900, and thereafter, on March 8, 1900, Solomon L. Swarts was elected and qualified as trustee of the bankrupt estate. On June 1, 1900, said Swarts, as such trustee, had in his hands and on deposit in the designated depository $68,320.00 in money belonging to the bankrupt estate. On February 24, 1902, the

respondent, as collector of the revenue, filed a petition alleging that State, school and city taxes for the year 1901 had been regularly assessed against the property in the possession of said trustee on June 1, 1900, said property being said sum of $68,320, and that a tax bill for said tax, properly certified, had been delivered to said collector for collection, and prayed for an order directing the trustee to pay respondent the sum of $1,298.08, the amount of said tax bill, together with the accrued penalties, fees and commissions, as provided by the State law. Appellant, as trustee, filed an answer to the petition, denying that the taxes sought to be collected by the petitioner, were a legal and proper charge against the trustee, or that the same ought to be paid by said trustee out of the funds of the estate in his hands. The District Court ordered the trustee to pay the collector the sum of $1,298.08, being the face of the tax bill. From the decision of the Circuit Court of Appeals affirming the order so made, this appeal is taken by the trustee.

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals erred in holding that the money in the hands of a trustee in bankruptcy is liable for taxes assessed by the State of Missouri under a State statute which provides that "every person owning or holding property on the 1st day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

ARGUMENT.

The question presented by the record in this case is whether money deposited by a trustee in the designated depository of the court is, under the bankruptcy law of 1898, liable for taxes assessed by a State under a State statute which provides that "every person owning or holding property on the 1st day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year" (R. S. Mo., 1899, Sec. 9188).

Appellant contends that property in the possession of a trustee in bankruptcy is not taxable by the State for the reasons: First, that the State has no sovereignty over that property, and, therefore, cannot tax it; second, that the bankruptcy act does not provide for the payment of such taxes; and, third, that the laws of the State of Missouri do not expressly make such property taxable.

I.

As to the first proposition, our position may be briefly stated as follows: —

The people of the United States, by Article 1, Section 8, of the Constitution, have granted to Congress the power "to establish uniform laws on

the subject of bankruptcy throughout the United States." That power necessarily includes the power to establish rules for the distribution of the bankrupt's property, and, inasmuch as the laws on the subject are required to be uniform, when Congress, acting under that power, passed the present bankruptcy act and therein prescribed rules for the distribution of a bankrupt's property, the Federal government thereby took exclusive control of that distribution, and no other sovereignty, be it State or foreign, is permitted to exercise any power that burdens or in any manner interferes with the distribution prescribed by the act.

The principle for which we contend lies at the bottom of our system of government and was early established by the decision of this court in the case of McCulloch v. State of Maryland, 4 Wheat. 316, and the language of Chief Justice Marshall in his opinion in that case is applicable almost in its entirety to the question now before the court.

That the power thus granted by the people to Congress is a sovereign power, is clear. "All legislative powers," says Chief Justice Marshall, "appertain to sovereignty. The original power of giving the law on any subject whatever is a sovereign power."

As the distribution of the bankrupt's estate is a necessary part of the bankruptcy system, it follows that the enactment by Congress of a law prescribing the method of such distribution was an exercise of sovereignty on the part of the United States government.

That when Congress enacted the present law, that law became supreme, will be admitted. As said by Chief Justice Marshall in the McCulloch case, "The government of the United States, though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.'"

Not only is the bankruptcy law supreme with reference to the distribution of a bankrupt's property, but, since the laws on the subject of bankruptcy are required by the Constitution to be uniform, that law vests in the Federal government *exclusive* sovereignty over the bankrupt's property.

As said by Mr. Justice Bradley, speaking for this court in Robbins v. Shelby Taxing District, 120 U. S. 489, at page 492: "The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, *or admit only of one uniform system or plan of regulation.*"

This language is equally applicable to the power of Congress to establish a system of bankruptcy, since the Constitution requires that the system so established be uniform. It must be apparent that to admit State taxation of the bankrupt's property, would deprive the system of uniformity, since property located in two or more States, the title to which is vested in a trustee in bankruptcy, would bear taxes differing in amount and varying with the State

in which it is located, and the amount which creditors of the bankrupt would receive would vary accordingly, being dependent upon the taxes imposed by the respective States in which the property might be located.

It will also be apparent that the trustee might under certain circumstances be compelled to pay taxes for the same year on the same property to two different States. Suppose, for example, that the bankrupt had his residence in the State of Missouri, but owned real estate in the State of Illinois. Let us assume further that the laws of Illinois provide that every person owning property on the 1st day of May should be liable for taxes thereon for the ensuing year. If between the 1st day of May and the 1st day of June this property is sold by the Trustee, and the proceeds come into his hands prior to the 1st day of June, he would be required to pay taxes for one and the same year both to the State of Illinois and to the State of Missouri on the same property or its equivalent.

It is true that this same inequitable situation would be presented where the property is not in bankruptcy, but that result would follow as an incident to the sovereiguty of the respective States, and only shows the more clearly that such sovereignty cannot be admitted in respect of property which the Federal government is required to distribute under uniform rules.

We beg to suggest that the proposition here contended for differs from that urged before this court in the case of Hanover National Bank v. Moyses,

186 U. S. 181, where it was held that Section 6 of the present bankruptcy act, recognizing exemptions allowed by the local laws at the time of the filing of the petition, does not render the act objectionable as lacking in uniformity. In that case it was held that the uniformity required is geographical, not personal, and that "no creditor can reasonably complain if he gets his full share of all that the law, for the time being, places at the disposal of creditors;" in other words, that the act does no more than confine creditors to such property as other legal process could reach. A different question, we submit, but one more analogous to the one now being considered, would have been presented, had the act provided for the allowance of any exemptions that might be prescribed by State laws in force at the time of the distribution of the estate. Such a law, we submit, would not be uniform.

If it be true that the power of establishing rules for the distribution of a bankrupt's property rests exclusively with Congress, and the rules prescribed by Congress are the Supreme law of the land, it would seem to follow that a State cannot tax that property while it is under the dominion of the bankruptcy law. If the State can take two per cent of this property in the exercise of its sovereignty, it can in theory take it all, and thus wholly prevent that distribution which Congress has prescribed. It will not do to say in answer to this, that the State will not take more of this property than of any other property. The question here is not what

the State will do; it is rather a question of the power of a State and of the repugnancy of such power to a constitutional law of the Union.

"The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress, to carry into execution the powers vested in the general government." (McCulloch v. Maryland, *supra.*)

In the language of Judge Cooley: "Any power which in its nature acknowledges no limits, and which in a lawful and legitimate exercise may be carried to the extent of an absolute appropriation of property or destruction of the franchise or privilege upon which it is exerted, must, as a power of one sovereignty be incapable of being attempted within the jurisdiction of another for exercise at the discretion of the power wielding it." (Cooley on Taxation, 2 Ed. Chap. 3, p. 83).

It may be urged that as this property, prior to the adjudication in bankruptcy, was under the sovereignty of the States, and, therefore, subject to taxation like all other property, there is no reason why it should escape taxation at the hands of the States while it is being administered in bankruptcy. But is not the same thing true of property that is in the act of being exported from a State or of property that is being transported from one State to another? This court has held that "no State has a right to lay a tax on interstate commerce in any form, whether it be in the way of duties laid on the transportation of the subjects of that commerce, or on

the receipts derived from that transportation, or on the occupation or business of carrying it." (Leloup v. Mobile, 127 U. S. 640.)

And in Kelley v. Rhoads, 188 U. S. 1, it was held that no State could tax property that was being transported from one State to another, even though it remained within that State for a reasonable time required by the transportation.

In the case of Philadelphia & Reading R. R. Co. v. Pennsylvania, 15 Wall. 232 (21 L. Ed. 146), it was held that a State act imposing a tax on freight, so far as it applies to articles carried through the State, or articles taken out of it, or articles taken up without the State and brought into it, is unconstitutional and void.

In all of these cases, the reason of the decision has been that an exercise of sovereignty on the part of the State was an interference with the operation of constitutional laws enacted by Congress to carry into effect the power vested in the national government.

As said by this court in its opinion in the last mentioned case, delivered by Mr. Justice Strong: "While upon the one hand it is of the utmost importance that the States should possess the power to raise revenue for all purposes of a State government, by any means, and in any manner, not inconsistent with the powers which the people of the States have conferred upon the general government, it is equally important that the domain of the latter should be preserved free from invasion, and that no State legislation should be sustained which

defeats the avowed purposes of the Federal Constitution, *or which assumes to regulate or control subjects committed by that Constitution exclusively to the regulation of Congress.*"

We are unable to see why the imposition of a tax on the funds which a court of bankruptcy is directed to collect and distribute in the way prescribed by Congress, does not hamper or interfere with the distribution of those funds.

The principle which permits the taxation of property owned by agents of the Federal government has no application to the question we are considering. Such taxation does not necessarily hinder the efficient exercise of the power of those agents to serve the government, and the decisions permitting such taxation were expressly based upon that ground. It has, however, always been held that "A tax upon the operation of these agents is a direct obstruction to the exercise of Federal powers" (R. R. Co. v. Penniston, 18 Wall. 5), and upon similar principles a tax upon property over which Congress has lawfully taken supreme and exclusive control, and which it has ordered distributed under prescribed rules, necessarily interferes with and is a direct obstruction of the exercise of Federal powers.

That the right of a State to demand of the bankruptcy court taxes accruing even prior to bankruptcy proceedings must be traceable to the provisions of the bankruptcy act, was held in the case of In Re Stuyvesant Bank, 12 Blatch. 189, decided under the act of 1867, where the court says: —

"Preference is given by the bankrupt act, as it usually is by the State laws, to debts due the State in which the bankruptcy proceedings are pending. As sovereign authority upon a subject within the jurisdiction of the Federal authority, Congress provides, first, for the payment of debts due the United States. In apparent deference to the authority which would be supreme, except for its own intervention, it enacts that the debts due the State in which the proceedings are pending, shall next be paid. This preference exists simply because the act of Congress so enacts, and if Congress had not so enacted, or if it should afterwards enact otherwise, the preference would cease. It is a rule of distribution merely, and if Congress should abolish the preference given by the act to either government, it would be an exercise of undoubted power, and no rights or liens would be infringed. The power to establish a system of bankruptcy carries with it the power to establish the details of the system as Congress shall think proper."

If it be true, of debts which became due to the State prior to the bankruptcy proceedings, that a preference exists as to them simply because the act of Congress so enacts, *a fortiori*, it must be true as to State debts accruing after the institution of bankruptcy proceedings.

In its opinion in the case at bar, the Circuit Court of Appeals holds that, inasmuch as a bankrupt's property has not been exempted from State taxation by the bankruptcy act, therefore it is subject to such

taxation. If we are right in our position, it does not require exemption by Congress to free a bankrupt's property from taxation, but it requires permissive legislation by Congress to subject such property to taxation, and the permitted taxation would have to be uniform in order to be constitutional.

The Circuit Court of Appeals seems to liken this case to the taxation of a receiver of a Federal court appointed in an ordinary equitable proceeding. It is true as stated in the opinion of the Court of Appeals that property in the custody and control of receivers and trustees of the Federal courts has always been held to be subject to taxation under the State laws the same as other like property, but clearly a trustee in bankruptcy occupies a different position from a receiver or trustee in an ordinary judicial proceeding, in this, that the disposition of the funds in his hands is prescribed by an act of Congress which is the supreme and exclusive law with reference to such distribution, and the bankruptcy court, which is but the means created by Congress to carry that distribution into effect, has no power to vary or enlarge the rules prescribed by Congress for such distribution. A court of bankruptcy is a court of limited jurisdiction in respect to the distribution of property in its hands; its duty is to ascertain whether there is anything in the bankruptcy act which provides for the relief sought, and if no authority for the granting of that relief can be found in the act, the bankruptcy court must deny it. On the other hand, a court of equity acting under its common-law

powers, administers, not the substantive rights given by a law of Congress, but rights arising out of the general principles of equity jurisprudence. Its jurisdiction is a general jurisdiction, and if the claim presented to it be meritorious, its duty is to ascertain whether there is anything in the general principles of the law which forbids granting the relief sought.

We concede that a court of bankruptcy should exercise the powers granted it by the act in accordance with the principles of equity, but we submit that the extent of those powers is to be ascertained from, and is limited by, the language of the bankruptcy act.

Collier on Bankruptcy (3d Ed.), page 8 and cases cited.

II.

We come now to the consideration of the question: To what extent does the bankruptcy act of 1898 provide for the payment of State taxes out of funds in the custody of the bankruptcy court? The only provision of the act bearing directly upon this inquiry is section 64, which is as follows: —

(*a*) "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with

the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

(*b*) "The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks or servants which have been earned within three months before the date of commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who, by the laws of the State, or the United States, is entitled to priority."

In addition to the foregoing section, we call attention to sections 70a and 47a of the bankruptcy act, the former vesting title to the bankrupt's property in the trustee as of the date of adjudication, and the latter requiring trustees to "collect and reduce to money the property of the estates for which they

are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest."

It would seem quite clear that Section 64 does not provide for the payment of any State taxes assessed against the trustee. It does clearly provide for the payment of "*all taxes legally due and owing by the bankrupt*," and, upon the principle *expressio unius est exclusio alterius* it would seem to follow that no other taxes are to be paid. Would not the words "by the bankrupt" be rendered meaningless if section 64 were interpreted as requiring the court to order the payment of *all* taxes that might be assessed by the State?

Furthermore, it is to be observed, as stated by the Referee in this case, that to impose upon trustees in bankruptcy the duty of making returns and of paying current taxes will tend to obstruct and prolong the administration of bankrupt estates.

This is evident from the provisions of the statutes of Missouri governing the assessment and collection of taxes.

Section 9186 of the Revised Statutes of Missouri of 1899 provides that "every person owning or holding property on the 1st day of June, including all such property purchased on that date, shall be liable for taxes thereon for the ensuing year."

Section 9144 provides that "the assessor or his deputy shall between the first days of June and January proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof in the following manner:

He shall call at the office, place of doing business, or residence of each person required by this chapter to list property, and shall require such person to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county in this State, in accordance with the provisions of this chapter."

In addition to the foregoing provisions, the statutes provide for the manner of assessing taxes by the assessor (including the right of appeal to a Board of Equalization) and also for the payment of taxes (see Judson on Taxation in Missouri, chapter 13, page 201).

Under these statutes a person owning or holding property on June first, is liable for taxes thereon for the ensuing year. The statutes require that between June 1st and January 1st following, the owner of property must return a list of taxable property owned, controlled or managed by him (Sec. 9144). After the taxes are duly assessed, the tax bills are turned over to the collector, and they are not ready for payment until about the 1st day of October of the following year. So that in the present case the taxes on property in the possession of the trustee on June 1st, 1900, were not payable until October of the following year. It must be evident that the imposition of these taxes would tend to obstruct and prolong the administration of bankrupt estates, and while this of itself might not furnish a sufficient reason for denying the right of the

State to assess and collect taxes from the trustee, yet in view of the provisions of the bankruptcy act requiring the estate to be closed as expeditiously as possible, no unnecessary inferences ought to be made in favor of such taxation.

In this connection we call attention to the fact already adverted to, that the property of the bankrupt at the time of the appointment of a trustee may be located in different States, and may have already been subjected to taxation in those States, before it comes into the possession of the trustee, and in this way the property be subjected to double taxation. Furthermore, much time may be consumed in the recovery of this property by the trustee, the settlement of the bankrupt estate may be delayed for several years where claims are disputed, and the orderly administration by the trustee may be interfered with by conflicting and debatable claims of various jurisdictions, and the funds belonging to the trustee be measurably diminished, if State taxation of the bankrupt's property be permitted.

The precise question involved in this case, so far as we have been able to ascertain, has been passed upon only in the case of In re Sims, 118 Fed. 356, decided by the District Court for the Western District of Georgia, where the court held that the funds of a bankrupt's estate in the hands of the trustee are subject to State taxation. In that case it is admitted by the court that the act does not expressly provide that funds held by officers of the court pending the litigation should be liable to taxation, but the court proceeds upon the reasoning that a tax

is a debt due to government, and that the levying and collecting of such tax is an exercise of sovereignty, and that nothing will be presumed against such sovereign right. The opinion in that case is based largely upon the decision of this court in the case of U. S. v. Herron, 20 Wall. 251 (22 L. Ed. 275). That case involved the question whether the liability of a surety on the bond of a United States public officer was discharged by the bankruptcy of such surety. It was held that such a conclusion should not be adopted unless the intention of the law to discharge such liability is expressed in clear and unambiguous terms. The basis of that decision was that the legislature will not be presumed to have intended to take away the prerogatives, right, title or interest of the sovereign, that is to say, of *its* sovereign. The decisions relied on by this court are English cases, where the relations of Parliament to the Crown were in question, and Federal cases where the rights of the Federal government were sought to be controlled by enactments of Congress. The principle applied was that "The Crown is not bound, unless specifically named." If this were a case in which the right of the Federal government to the collection of taxes was involved, the application of the Herron case would be clear, but as the States are not sovereign with respect to such measures as are vested by the Constitution in Congress, we are unable to see the application of that case to the present inquiry. If the sovereignty of the States continues over the property in the hands of a trustee in bankruptcy, then it can continue to tax

that property; if, on the other hand, as to that property, its sovereignty ceases, then the maxim that "the Crown is not bound, unless specifically named," has no application. Certainly it has no application to the relation between the States and Congress in respect of any constitutional law enacted by Congress.

The only other cases, so far as we know, in which the construction of Section 64 of the bankruptcy act in reference to the payment of State taxes has been referred to, are the cases of

In re Conhaim, 100 Fed. 246; 4 A. B. R. 58; and

In re Keller, 109 Fed. 131; 6 A. B. R. 351;

In the Conhaim case, upon a petition filed by the purchaser of a bankrupt stock, asking for an order upon the trustee to pay taxes which had been assessed on the stock in the name of the petitioner, the court, while denying the petition, directed the trustee to have assessed in his own name as trustee, the taxes which under the law should have been assessed against and paid by the bankrupt. It is apparent from a reading of the case, that the order of the court amounted only to a direction that the trustee pay taxes legally due and owing by the bankrupt, since the taxes which he was ordered to pay were the taxes for which the bankrupt became liable prior to the adjudication in bankruptcy. The decision was, therefore, clearly within the spirit, if not the letter, of Section 64.

In the course of his opinion, however, Hanford, J., uses the following language: "The manifest intent of the law is, that while the estate is in the hands of the trustee, his custody shall not constitute a barrier to prevent the collection of taxes, which would be collectible under the law, if the property remained in the possession and control of the bankrupt himself."

Taken in connection with the point actually decided in the case, there is nothing improper in this *dictum*. Nothing can be clearer than that Congress did not intend that the custody of the trustee should constitute a barrier to prevent the collection of taxes, which would be collectible under the law, if the property had remained in the possession and control of the bankrupt himself. On the contrary, it is clear that Congress intended that that custody should not constitute a barrier to prevent the collection of taxes he was legally liable to pay, since the act expressly gives a preference to such taxes. If, however, the *dictum* be regarded as asserting that the State has a right to make the trustee pay other taxes than those mentioned in the act, we deny that there is any warrant in the language of the act for such an assertion.

In the Keller case the facts were these: The bankrupt owning a stock of goods was adjudged a bankrupt on December 24, 1900, and the trustee was appointed January 7, 1901. The statutes of Iowa provided that property should be listed and assessed each year in the name of the owner thereof on the first day of January, and that taxes upon

stocks of goods should be a lien thereon, and continue a lien thereon when sold in bulk, and might be collected from the owner, purchaser or vendee. (It will be noted that on January 1, 1901, the bankrupt was the owner of the stock.)

This stock was, on February 12, 1901, sold in bulk by the trustee *free and clear of all liens*, and the court very properly held that the equities as between the trustee and the purchaser required that the trustee should pay the taxes assessed on January first for the year 1901. A mere statement of the facts of the case is sufficient to show that the decision was correct, and that the right to tax a trustee under the bankruptcy law was not even remotely in question. The taxes were legally assessable against the bankrupt and constituted a lien on the stock. The court very properly said in deciding the case: "The equity in favor of the bank (the purchaser) does not grow out of the provisions of Section 64 of the bankrupt act, which provides for the payment of all taxes legally due and payable, but is based upon the fact that the property, being in the custody of the court of bankruptcy, was ordered to be sold at public auction free and clear from all liens."

The court adds, however, by way of an *obiter dictum*, the following:—

"There is nothing in the language or purpose of the bankruptcy act which justifies the holding that claims for taxes due the State, county or city are not to be recognized and properly protected by the trustee. Section 64 already cited makes it the duty

of the trustee to pay all taxes legally due and owing" (the court here omits the words "by the bankrupt") "in preference to the claims of creditors, and while it may be true, as is claimed by counsel for the trustee, that this section refers only to taxes that have been levied and are due and payable in the complete sense of these words, yet the enactment of the section shows that Congress recognized claims for taxes to be so highly meritorious that preference in payment over ordinary debts is granted thereto in the distribution of bankrupt estates."

We submit that, in so far as this language may be taken as referring to the right of the State to receive taxes assessed against the property *while it is in the course of administration*, it is wholly unwarranted by the language of the act or by any principle which should govern the court in construing the act. While the court was perhaps justified in saying that the language of the act ought not to be construed as confining the court to ordering the payment of taxes that have been levied and are due and payable in the complete sense of these words, the court was certainly not justified in holding that there is anything in Section 64 which shows that Congress recognized any claims on the part of the State for taxes except those which could be held to be due from the bankrupt. If Congress had intended that the court should order all taxes imposed by the State to be paid, why did Congress in its instructions to the court of bankruptcy confine itself to ordering the payment of taxes legally due and owing by the bankrupt?

That Congress intended that the court should order the payment of such State taxes only as are assessable against the bankrupt is evident, not only from the language of the act itself, but also from a comparison of the act of 1898 with that of 1867. The act of 1867 in section 28, being section 5101 of the Revised Statutes of the United States, and being the section of the act of 1867 which corresponds with the one under consideration, provides for the payment of "all debts due to the State in which the proceedings in bankruptcy are pending, and of all taxes and assessments made under the laws thereof." It also provides, in language almost identical with that of the present act, for the payment of "all debts due to any persons who, by the laws of the United States, are, or may be, entitled to a priority," and then adds this clause, "*but nothing contained in this title shall interfere with the collection and assessment of taxes by the authority of the United States or any State.*"

The distinctions between the present act and that of 1867, in reference to State taxes, are at once apparent. The present act provides in terms only for the payment of "all taxes legally due and owing by the bankrupt," while the act of 1867 provides for the payment of "all taxes and assessments made under the laws of the State." Furthermore, the present act omits the clause contained in the act of 1867, which forbade any such construction of the act as would warrant an interference with the assessment and collection of taxes by authority of the State. It would seem that the act of 1867

intended that the bankrupt estate should continue to be assessed for State taxes. It is certainly apparent from a comparison of the two acts that Congress intended by the act of 1898 to provide for the payment of "all taxas legally due and owing by the bankrupt," and none other. If Congress intended by enacting Section 64 to require the payment of all taxes that the State should see fit to impose during the course of the administration of the bankrupt estate, then why did Congress omit from this bankruptcy act the provisions of the former act, which expressly required that "all taxes and assessments made under the laws of the State" should be paid and which forbade the court of bankruptcy to interfere with the assessment and collection of taxes by the authority of the State, and insert in lieu thereof a provision which requires only the payment of "taxes legally due and owing by the bankrupt?"

Surely the changes made by Congress in the language of the act are significant of its intention. As said by this court in the case of Bardis v. Bank, 178 U. S. 524, where the question was as to the jurisdiction of the Federal Circuit and District Courts under the act of 1898: "We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of Section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts."

The Referee, in deciding the case at bar, appar-

ently felt that no inference favorable to the payment of these taxes could be drawn from the language of Section 64a, providing for the payment of taxes legally due and owing by the bankrupt; he, however, held that this tax was payable as part of the "actual and necessary cost of preserving the estate subsequent to filing the petition." We submit that the Referee's construction of this portion of Section 64 is unwarranted. Certainly if Congress intended by the clause providing for the payment of "actual and necessary cost of preserving the estate," the payment of State taxes pending the administration of the estate, some reference would have been made to the first part of the section, wherein State taxes are specifically provided for. To say that State taxes on the fund in the possession of the trustee are a part of the actual and necessary cost of preserving the estate, is to assume, not only that the property is taxable under the laws of the State, but also that the provisions of the bankrupt act permit the payment of such taxes. We submit, on the other hand, that unless we can find something in the policy or purposes of the bankrupt act which justifies the conclusion that Congress intended that such property should be subject to taxation by the State, the property is not subject to such a tax, and, therefore, the payment of such a tax is not an actual and necessary expense of preserving the estate.

State taxes are levied "for the support of the government of the State, the payment of the State debt and the advancement of the interests of the State" (Sec. 9118, R. S. Mo., 1899). If the

bankrupt's property is administered under the exclusive sovereignty of the United States, how can taxes for the support of the State government, or the payment of the State debt, or the advancement of the State's interest, be any part of the necessary cost of preserving the bankrupt's estate? With these purposes the bankruptcy act is not concerned except in so far as Congress has therein taken cognizance of them.

III.

We submit finally that the trustee is not the owner or holder of the money deposited by him in the designated depository, and that he has neither the charge, care nor management of such money, within the meaning of the statutes of Missouri relating to taxation. We have already sufficiently referred to the provisions of the statutes of Missouri with reference to taxation.

It will doubtless be conceded that unless the tax which is sought to be imposed upon the trustee can be sustained as being within the words of the statute, it cannot be sustained as within its spirit. In the case of City National Bank v. Charles Baker Co., 6 N. E. Rep. 223, Judge Holmes of the Supreme Court of Massachusetts, held that where there was no statute expressly authorizing a receiver to be taxed, but there was a statute authorizing the taxation of property held by assignees in insolvency, bankruptcy, or for the benefit of creditors in a voluntary assignment, the language of the statute plainly did

not extend to receivers, and that the mere fact that a receiver had deposited money in bank to his own credit, thereby becoming technically the owner of the credit, did not render him liable to taxes, merely because he held the legal title.

That the power to assess a tax must be clearly given in order to be exercised, has been decided in State ex rel. v. R. R. Co., 149 Mo. 635, and cases therein cited.

It is true that under the statutes of Missouri, it has been held that a curator in possession of the property of a minor is taxable as one having the care, charge or management of the property, State ex rel. v. Burr, 143 Mo. 209, and in that case the court said: "The statute upon its face clearly indicates that a curator or other trustee shall list not only that which he owns in his own right, but that of which he has the care, charge or management." But we submit that a trustee in bankruptcy neither owns nor holds money belonging to the bankrupt estate in the sense in which a curator or other trustee appointed to take charge of and manage an estate, owns or holds the same. Clearly in the case of the curator, the property is under his care, charge and management, and while to a certain extent he is subject to the control of the court, his position is in nowise the same as that of a trustee in bankruptcy.

When a debtor is declared a bankrupt and his property is taken in charge by the court of bankruptcy, the assets are no longer the bankrupt's in the eyes of the law; they belong to the creditors, including the State and the United States, as their claims

are recognized in Section 64. The debtor has not even a voice in naming the person who is to assist the court in getting in and distributing these assets. The assets are in every sense the property of the creditors as they may be ultimately determined in accordance with the provisions of the bankruptcy act. The office of the court is to collect in, convert into money, and distribute these assets, and in order to enable the court to do this an individual appointed by the court is vested with the title to these assets, and is called a trustee in bankruptcy. Has that trustee the management of the fund after it has been placed in the designated depository? In what sense can a person be said to be a manager who has no authority over a fund, who is unable to perform any act with reference to the same, except as directed by the court? He is really nothing more than an officer of the court, like a sheriff, whose duty it is to convert assets into money, as an officer of the court, and distribute them under the orders of the court. The whole purpose of the bankruptcy act is to convert property of the bankrupt into money and distribute it, and the trustee is an officer of the court who is employed to assist in doing this. It is manifestly improper, therefore, to liken such an officer to a curator or a trustee appointed under a will. If any one can be said to have the management of the fund, it is the court of bankruptcy, and we submit that its office is not to manage the fund, but simply to distribute it.

In the case of In re Kellinger, 9 Paige Ch. 62, Chancellor Walworth held that neither the register

nor the clerk of the court of chancery, nor the court itself, could be assessed as a trustee for funds or securities in their possession belonging to suitors, under a statute making a trustee who has possession or control of the property the owner thereof for the purpose of taxation.

In the case of State v. Irons, 35 N. J. L. 464, the court says: "A sheriff who has collected money on a *fieri facias*, and a clerk of a court who is intrusted with the custody of funds paid into court, are in a certain sense trustees, and occupy a fiduciary position; yet it has never been suggested that they are liable for taxation as trustees on the funds collected or held by them in their official capacity."

A moment's consideration will show that the position of a trustee in bankruptcy is rather to be likened to that of a sheriff or other officer of the court who has temporary charge of property or funds for a specific purpose, and who is acting entirely under the control of the court, than to a trustee under a will or a curator or other person who stands in the place of the owner of the property. A trustee in bankruptcy stands in the place of the court; he is in every sense an officer of the court, and in no sense a representative of the bankrupt.

We think it will readily be conceded that a sheriff would not be taxable under a law providing that the owner or holder of property should be liable for taxes; it may well be supposed that a sheriff who has sold property on the 30th day of May, and has the money in his possession on the first day of June,

may be required to pay it over on that day. Would it be contended that such money in the sheriff's hands could be legally assessed for taxes in the name of such sheriff, unless there were a special provision of the law which expressly made the fund taxable? Such assessment would interfere with the due and proper administration of justice, and in the same way, and to the same extent, an assessment of taxes against a trustee in bankruptcy would interfere with the due and proper adminstration of justice in the bankruptcy courts, and no inference in favor of the right to make such assessments should be drawn.

We submit, therefore, that inasmuch as the trustee in bankruptcy under the law of 1898 is not the owner of the fund in the depository, and has not the care, charge or management of such fund, but the ownership of such fund is in the creditors, and the care and charge thereof is in the court, the statutes of Missouri should not be construed as taxing the trustee on account of such fund.

It may be urged that if the trustee be not taxable, property not specifically exempted by the State law would escape taxation. We submit, however, that this is not necessarily true, since creditors of the bankrupt within the jurisdiction of the State are taxable on account of all property, including solvent notes, and all other property, except merchandise, not specifically enumerated. Section 9144, R. S. Mo., 1899.

Furthermore, even if the property should escape taxation, it would not warrant the imposition of any tax that is not within the letter of the statute, and

certainly would not warrant the taxing by the State of property which is under the exclusive sovereignty of the United States.

In this connection it is to be noted that the tax which is sought to be collected from the bankrupt estate is not the same tax which the bankrupt would have had to pay had he continued in the control and management of his own property, unconverted into money. Presumably the bulk of the bankrupt's property was a stock of merchandise, on which a license tax would have been collected, and which under section 9144 the bankrupt was not required to list for taxation. It follows that the officer of the court while engaged in distributing the fund for the benefit of creditors would under the tax bill in this case be required to pay a different, and, we may add, a larger amount than what the bankrupt itself would have been required to pay if it had remained in possession. We submit that no equities should be invoked in favor of any such tax.

Respectfully submitted,

LEE SALE,
SOLOMON L. SWARTS,
Attorneys for Appellant.

WOLF & COHEN,
Of counsel.

Supreme Court of the United States.

OCTOBER TERM, 1902.

SOLOMON L. SWARTS, TRUSTEE IN BANKRUPTCY OF SIEGEL-HILLMAN DRY GOODS COMPANY,
APPELLANT,
vs.
L. F. HAMMER, JR., COLLECTOR OF THE REVENUE OF THE CITY OF ST. LOUIS, MISSOURI,
APPELLEE.
No. 641.

STATEMENT AND ARGUMENT FOR APPELLEE.

STATEMENT.

The Siegel-Hillman Dry Goods Company, of the city of St. Louis, Mo., was adjudged bankrupt on February 8, 1900; and thereafter, on March 8, 1900, Solomon L. Swarts was elected and qualified as trustee of the bankrupt estate. On the 1st of

June, 1900, said Swarts, as such trustee, had in his hands, and on deposit in the designated depository in the city of St. Louis, Missouri, the sum of $68,-320.00 in money belonging to the bankrupt estate. On February 24, 1902, L. F. Hammer, Jr., appellee, Collector of the Revenue for the city of St. Louis, filed before the Referee, Walter D. Coles, Esquire, a petition alleging that State, school and city taxes for the year 1901 had been regularly assessed against the property in the possession of said trustee on the 1st day of June, 1900, said property being said sum of $68,320.00 in money before mentioned, and that a tax bill for said taxes, properly certified, had been delivered to said collector for collection, and prayed that the Referee make an order, directing the trustee to pay him the sum of $1,298.08, the amount of said tax bill, together with the accrued penalties, commissions and fees, as provided by law. The trustee, thereafter, on February 24, 1902, filed an answer to the petition of the collector, denying that the taxes sought to be collected by the petitioner were a legal and proper charge against the trustee or that the same ought to be paid by said trustee out of the funds of the estate in his hands. The matter came on to be heard before the Referee, and, on June 16, 1902, the Referee made an order directing that the trustee pay to the petitioner the sum of $1,298.08, the amount of said tax bill for the year 1901, together with the accrued penalties and fees provided by law.

The opinion of the Referee, which is contained on pages 3 and 4 of the Transcript of Record in this

court is here set out for ready reference. It was as follows: —

> The petition of the collector in this case presents the general question whether property in the hands of a trustee in bankruptcy is subject to taxation under the statutes of this State. I have carefully considered the briefs of counsel, the relevant provisions of the statutes, and the pertinent cases, and have reached the following conclusions: —
>
> 1. A trustee in bankruptcy is, by virtue of the provisions of the bankrupt law (Section 70), vested with plenary title to all the property of the bankrupt, not declared to be exempt. The fact that the trustee holds such title in trust for the purposes declared in the act, does not in any way impair his title, and such title is complete and effectual as against all the world. Until a dividend is declared, or a distribution ordered, no creditor of the bankrupt estate has any title attaching to the whole or to any part of the property in the possession of the trustee; and a creditor having an allowed claim, cannot properly be considered the owner of an undivided interest therein. Until a distribution is ordered, the right of a creditor is limited to securing compliance, on the part of the trustee, with the provisions of the act, regulating the administration and distribution of the estate.
>
> 2. The property of a bankrupt estate in the hands of a trustee in bankruptcy, is " under the care, charge, and management " of such trustee, within the meaning of Section 9144 Revised Statutes of Missouri, 1899, and it is therefore

the duty of such trustee to make return of such property for purposes of taxation. The foregoing conclusion seems to follow necessarily, from the fact that the trustee has title to the property of the bankrupt estate, and is charged by law with the custody, preservation and management thereof. The mere fact that the bankrupt law imposes certain restrictions upon the trustee's right to deal with the property, and throws certain safeguards around his right to control it, does not impair or invalidate the foregoing conclusion. (State v. Burr, 143 Mo. 209.)

3. While Section 64a of the bankrupt law seems to relate solely to taxes "due and owing by the bankrupt," prior to bankruptcy, Section 64b provides for the payment in full out of the bankrupt estate of the "actual and necessary costs of preserving the estate subsequent to filing the petition." The latter provision is of a very comprehensive character, and was unquestionably intended to provide for the payment of all proper expenses and charges incident to the continued existence and preservation of the assets of the estate. Property in the hands of a trustee in bankruptcy is embraced within the terms of the State statutes imposing taxes, and I can see nothing in the policy or purposes of the bankrupt law, which would justify the conclusion that Congress intended that such property should be held exempt from the burden of State taxation.

4. To impose upon trustees in bankruptcy the duty of making returns and of paying current taxes will certainly tend to obstruct and prolong the administration of bankrupt estates, but that

fact does not justify the conclusion that such trustees are not obliged to pay taxes. Where the law clearly imposes the duty of paying taxes, the delay and inconvenience resulting from compliance with the law, is no excuse for non-compliance, and the "argument from convenience" has no application in such a case.

5. So far as there have been any adjudications upon the question, the conclusions reached are in conformity to the foregoing views. In re Conhaim, 100 Fed. 268; 4 American Bankruptcy Reports, 58; In re Keller, 109 Fed. 131; 6 American Bankruptcy Reports, 351.

In accordance with the foregoing views, the petition of the collector is sustained, and the trustee is ordered to pay the petitioner the sum of $1,298.08, together with the accrued penalties, and the fees, provided by law."

The question being certified by the Referee to the Judge of the District Court of the United States for the Eastern Division of the Eastern District of Missouri for his opinion thereon, Judge Adams, on June 25th, 1902, ordered that payment be made by the trustee to appellee of the amount of the tax bill, viz., $1,298.08; the order of the District Court being set out on page 5 of the Transcript of Record in this court.

An appeal having been taken on behalf of the Trustee to the Circuit Court of Appeals, Eighth Circuit, the decree of the District Court was affirmed, the opinion of the Circuit Court of Appeals, delivered by Caldwell, Circuit Judge, as contained on pages 10 and 11 of the Transcript of

Record in this court, being here set out for convenient reference. It was as follows: —

"United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1902.

Appeal from the District Court of the United States for the Eastern District of Missouri.

Solomon L. Swarts, Trustee in Bankruptcy of Siegel-Hillman Dry Goods Company, Appellant, vs. L. F. Hammer, Jr., Collector, etc., Appellee.	No. 1806.

Before Caldwell, Sanborn and Thayer, circuit judges.

Caldwell, circuit judge, delivered the opinion of the court: —

Solomon L. Swarts, as trustee in bankruptcy of the Siegel-Hillman Dry Goods Company, had in his hands as such trustee, the sum of $68,320 belonging to the bankrupt estate, which sum was deposited to the credit of the trustee in the designated depository of the court. This money was so held by the trustee at the time appointed by the law of the State for the assessment of moneys, and other personal property, and was duly assessed to the trustee. The trustee refused to pay the tax on

this money in his hands, claiming that the bankrupt law exempted it from taxation. The referee decided it was liable to taxation, and this decision was affirmed by the District Court and the trustee appealed to this court.

The money was clearly liable to be taxed under the State law and the tax is valid and collectible unless the bankrupt act exempts it from taxation.

Exemption from taxation is never presumed. The legislative intent to exempt property from taxation must be clearly and explicitly expressed.

Whether Congress could rightfully exempt from State taxation the property of a bankrupt in the hands of a trustee in bankruptcy and otherwise subject to taxation, we need not inquire. It has not attempted to do so, and it is highly probable it never will. The power of taxation, as well as the power to exempt from taxation is a legislative and not a judicial function. And a bankrupt court no more than any other court can exempt from taxation property in the hands of one of its officers which is liable to taxation under the State law.

It has never been questioned but what property in the custody and control of receivers and trustees of the Federal Courts was subject to taxation under the State law, the same as other like property (Judson on Taxation, section 407 and cases cited).

And this applies to trustees in bankruptcy as well as receivers and trustees in other cases and proceedings in the Federal courts. It is a grave mistake to suppose that property in the possession and custody of an officer of the Federal court, by that single fact, enjoys immunity from taxation. So far from exempting property in

the custody and possession of its officers from taxation, a Federal court, upon proper application, will always order and direct the payment of the taxes duly assessed on such property, and treat the same as a preferred claim against the estate or fund. *Judson on Taxation*, section 541.

The decree of the district court is affirmed. Filed February 2, 1903.

From this decision of the Circuit Court of Appeals, affirming the decree of the District Court appeal was allowed to Supreme Court of the United States.

ARGUMENT.

The only question before the court is whether, under the laws of the State of Missouri, and the bankruptcy law, property of a bankrupt estate should, pending administration, bear the ordinary State and municipal taxes?

I.

If such a tax is to be imposed, it must be based upon some law of the State of Missouri. It would seem, therefore, eminently proper to examine, first, the laws of Missouri, and see whether, by those laws, such property is taxable, and whether provision has been made for assessment against the trustee.

The first query naturally is: Do the Constitution and statutes of the State make such property taxable?

The answer is that, by positive enactment, *all property* in the State, real and personal, is made taxable, except that which is specifically exempt. Section 9118, R. S. of Mo., 1899, is as follows: —

> "For the support of the government of the State, the payment of the public debt and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 6 of Article X of the Constitution of the State makes specific exemption of State, county and municipal property and cemeteries, and provides that the legislature may exempt certain other classes of property. Acting under this license, the legislature has, by Sections 9119 and 9120, R. S. 1899, exempted certain classes of property. Section 7 of Article X of the Constitution provides that exemption of property other than that enumerated in Section 6 (and provided for by Sections 9119 and 9120) shall be void. Sections 9119 and 9120 are as follows: —

> "9119. The following subjects are exempt from taxation: First. All persons belonging to the army of the United States. Second. Lands and lots, public buildings and structures, with their furniture and equipments, belonging to the United States. Third. Lands and other property belonging to this State. Fourth. Lands and other property belonging to any city, county or other municipal corporation in this State, including market houses, town halls and other public structures, with their furniture and equipments, and all public squares and lots kept open for health, use or ornament. Fifth. Lands or lots of ground granted by the United States or this State to any county, city or town, village or township for the purpose of education, until disposed of to individuals by sale or lease. Sixth. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town to the extent of one acre. And lots one mile or more distant from such cities or towns to the extent of five acres, with the build-

> ings thereon, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable, shall be exempt from taxation for State, county or local purposes."
>
> "9120. The real estate and personal property which may be used exclusively for agricultural or horticultural societies heretofore organized, or which may be hereafter organized in this State, shall be exempt from taxation for State, county, city, or other municipal purposes."

It is not contended that these exemptions cover property belonging to a bankrupt estate.

Since the law makes all property taxable, except that specially exempted, and since the property of bankrupt estates is not exempted, it seems to follow that such property is taxable. It is not necessary, in order to make property taxable, that it should be specifically mentioned as being taxable. The Supreme Court of Missouri says, in Adelphia Lodge v. Crawford, 157 Mo. 356, l. c. 359: "Taxation is the rule, and exemption therefrom the exception." And again, in Fitterer v. Crawford, 157 Mo. 51, l. c. 59: "As a rule, all property is liable to taxation, and exemption is the exception." In St. Louis v. Wenneker, 145 Mo. 230–239, the Supreme Court met the objection that certain real estate belonging to the Mullanphy Emigration Relief Fund was not made specifically taxable, by saying: "The revenue laws direct an assessment of taxes on all real estate not exempt therefrom. * * * The general laws direct the assessment of real estate. There is

no reason for requiring a special act applicable to this property." Mr. Judson, in his work on Missouri Taxation, at page 88, says: "Our tax system is based upon the theory that all property is taxable, excepting that specifically exempted by the Constitution."

This property is, therefore, clearly taxable, within the meaning of the Missouri revenue laws.

The second query is: What provisions do the laws make regarding assessment and payment of taxes on such personal property?

Section 9186, R. S. 1899, says: —

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

Section 9144 says: —

> "* * * He (the assessor or his deputy) shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such person to make a correct statement of all taxable property owned by such person or under the care, charge or management of such person * * * being in any county of this State, in accordance with the provisions of this chapter."

This list must contain a statement of the various species of property mentioned in the section, including: —

"Fifth, money on hand; sixth, money deposited in bank or other safe place; * * * tenth, all other property not above enumerated and its value. Under this head shall be included * * * every other species of property not exempt by law from taxation."

The law, therefore, says that every person *owning or holding* property shall be liable for taxes, and requires a return of property not only of such as is owned, but also such as is under the care, charge or management of such persons. This seems to us amply broad to cover a trustee in bankruptcy.

By Section 70*a* of the Bankruptcy Law, the title to the property of the bankrupt estate vests in the trustee. The section specifies the date as of which the title vests, namely, the date of the adjudication. By section 70*b* the trustee can sell the property, subject to the approval of the court. By section 70*c* provision is made for transfer of title to purchaser. By section 70*f* provision is made for revestment of title in the bankrupt in case of composition. He is the holder of the legal title of the property of the estate. He has possession of the real and personal property of the bankrupt until sale can be made, and nothing but the money ultimately received from that sale is required to be placed in the depository selected by the court. Pending sale he may, subject always to the order of the Referee, have to perform about every service which is commonly associated with "care, custody and management of the personal property." When a sale is made the deposit of the

proceeds is still in his name. We do not see wherein his title differs *in kind* from that of an ordinary trustee. The Supreme Court of Missouri said in State ex rel. v. Burr, 143 Mo. 209–215: "The statute upon its face clearly indicates that a curator or other trustee shall list not only that which he owns in his own right but that for which he has 'the care, charge or management,' and even holds the curator personally liable for the taxes." It has been held in St. Louis v. Wenneker, 145 Mo. 230, that property held in trust by the City of St. Louis as trustee is taxable.

The title of a trustee in bankruptcy may be likened to that of a trustee under a trust instrument which prescribes the depository and provides for counter-signature of all checks. Would anyone contend that such a trust estate should escape taxation? The management and settlement of a bankrupt estate does not materially differ from the management of an estate in probate under the probate laws of the State of Missouri. The scrutiny of the court is more exact, and more safeguards are thrown about it; but the differences are not such as to, in any way, create a difference in the nature of the right by which the title to property is held. Executors, administrators, and others in charge of estates in probate, are taxable with property under their charge and control; and while, since the year 1893, a special statute (Sec. 9151, R. S. Mo. 1899), has controlled, the general statute above cited (Sec. 9144, R. S. Mo. 1899) imposed the same duty (see State ex rel. Burr, 143 Mo. 209).

The opinion of Judge Lowell, in the case of In re Mitchell, 16 N. B. R. 535; F. C. No. 9658, is interesting in this connection, as showing that, in his opinion, property was assessable in the name of the assignee in bankruptcy. He thus concludes: —

> "The remaining question is whether the assignees were the owners of this property. This closely resembles the question already answered, and the remarks I am about to make are to be taken as applicable to both points. If assignees are mere agents of the courts, and the fund is one in court, there might be reason to say that it was without a definite owner who could be ascertained and assessed; but there is no doubt that assignees are trustees with great powers and large discretion. They have the legal title and control of the property as fully as the bankrupt had, and it has been repeatedly decided that statutes which regulate the administration of their trust, such, for example, as require them not to sell by private contract, or not to bring action, or suit, without an order of court, or the consent of creditors, are merely directory, so that the neglect of them will form no valid objection to a title and no defense to an action or suit."

It seems clear to us that the Missouri statutes and decisions provide for the assessment of the property in the name of the trustee. The argument is made by counsel for the trustee that the statute makes it the duty of owners of claims against the bankrupt estate to list their claims as property, and, therefore, the trustee should not be assessed. The title

to the specific property or fund being in the trustee, our laws would certainly not exempt him from listing the property and paying taxes thereon, even if certain creditors had claims against the estate and should return those claims as taxable. Application of the rule contended for by counsel for the trustee would render nugatory the provisions of Section 9151. This same theory was urged upon the court in the case of Spaulding v. Commonwealth, 38 Ky. 185, above cited. But, as the court said there, the claims of the different creditors were absolutely undetermined and undeterminable. No creditor knows, or can know, with any degree of definiteness what his interest in a bankrupt estate may be. Then, too, the application of such a rule might entirely defeat the State's rights to taxes. Suppose the only creditors were non-residents. In such a case hundreds of thousands of dollars of property might be held by a trustee, under certain contingencies, for a considerable length of time. Although the property might be situated in this State, and under the protection of its laws, it would entirely escape taxation.

The trustee in bankruptcy summed up the law very succinctly in the first two clauses of his opinion. (See Transcript, p. 3.) He says: —

> 1. A trustee in bankruptcy, is, by virtue of the provisions of the bankrupt law (Section 70), vested with plenary title to all the property of the bankrupt, not declared to be exempt. The fact that the trustee holds such title in trust, for the purposes declared in the act, does

not in any way impair his title, and such title is complete and effectual as against all the world. Until a dividend is declared, or a distribution ordered, no creditor of the bankrupt estate has any title attaching to the whole or to any part of the property in the possession of the trustee; and a creditor having an allowed claim, can not properly be considered the owner of an undivided interest therein. Until a distribution is ordered, the right of a creditor is limited to securing compliance, on the part of the trustee, with the provisions of the act regulating the administration and distribution of the estate.

2. The property of a bankrupt estate, in the hands of a trustee in bankruptcy, is "under the care, charge and management" of said trustee, within the meaning of Section 9144, Revised Statutes of Missouri, 1899, and it is, therefore, the duty of such trustee to make return of such property for purposes of taxation. The foregoing conclusion seems to follow necessarily, from the fact that the trustee has title to the property of the bankrupt estate, and is charged by law with the custody, preservation and management thereof. The mere fact that the bankrupt law imposes certain restrictions upon the trustee's right to deal with the property, and throws certain safeguards around his right to control it, does not impair or invalidate the foregoing conclusion. (State v. Burr, 143 Mo. 209).

We believe that the laws of the State of Missouri not only clearly contemplate the taxation of property held by trustees in bankruptcy, but have provided for assessing such property in the name of the trustee.

II.

But we are met with the further argument that since by Section 8 of Article I of the Constitution of the United States, Congress has power to "Establish * * * uniform laws on the subject of bankruptcies throughout the United States," and since Congress has passed a bankruptcy law, we must find explicit authority in the bankruptcy law itself for the imposition of the ordinary property tax by a State against property held by the trustee in bankruptcy; otherwise, although such tax is against *the property*, and although the tax sought to be imposed is the ordinary property tax assessed against all similar property in the State and without discrimination, such taxation is interference with the constitutional rights of Congress and void; and it is further contended that the bankruptcy law does not either by letter or spirit authorize the imposition of this tax. We believe this contention is fundamentally wrong; that the State, as sovereign within its limits, has the right to tax property in the hands of a trustee in bankruptcy *as property*, at least in the absence of any prohibition by Congress. We contend further that exemption from taxation is never presumed; that nothing is to be presumed against the sovereign right of taxation, and that since the bankruptcy law does not prohibit the imposition of the usual property tax by the State upon the funds held by the trustee pending administration, the right to impose such tax exists in the sovereign State; we contend further, that the bank-

rupt law not only does not prohibit but does contemplate and authorize the payment of these taxes and, finally, that the bankruptcy court in the exercise of its equity powers should recognize the State's claim to priority and order the taxes paid. We will consider these points in their order.

It will doubtless be conceded that the power of taxation is an incident of sovereignty, and is co-extensive with that of which it is incident; that as between the government of the United States and the several States, Congress has only such taxing power as the Constitution of the United States delegates to it, while the States retain their original sovereign powers of taxation subject only to the restrictions which that Constitution imposes upon them. The restrictions which arise from the fundamental principle of supremacy of the Federal authority in the exercise of powers vested in the general government are, we will readily concede, as binding as those existing by express provision, and it is one of these restrictions, viz., that of the exemption of the instrumentalities of the Federal government from State taxation, that is here sought to be invoked. The general government has in the exercise of a power conferred by the Constitution enacted a general bankruptcy law. Under the provisions of that law appellant is acting as trustee of a bankrupt estate and the ordinary taxes are imposed by the State upon the property in his possession belonging to the bankrupt estate. No attempt is made to levy or impose a license or tax upon the trustee as such, nor upon the depository as such, nor upon the referee in

bankruptcy as such, nor upon any part of the machinery of the bankruptcy court or its process, nor upon property going through the bankruptcy court as such — simply an ordinary tax levied upon this property as upon all other similar property in this State and without discrimination. Does this constitute an interference with the powers of Congress such as to render the tax invalid?

The principle of immunity from State taxation, which the instrumentalities of government enjoy, is far from an absolute one; indeed, it is a very limited one. Mr. Justice Miller, in National Bank v. Commonwealth, 9 Wall. 353–362, says: —

> "The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is that the agencies of the Federal Government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle, founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the State."

Mr. Desty, is his work on Taxation, Vol. I., p. 77, says: —

> "It" (*i. e.*, the doctrine which exempts), "is limited by the principle that State legislation, which does not impair the usefulness or

capacity of such instruments to serve the government is not within the rule of prohibition."

Mr. Cooley, in his work on Taxation, at page 85, says: —

> "And a State may tax the property of Federal agencies with other property in the State, and as other property is taxed, when no law of Congress forbids, and when the effect of the taxation will not be to defeat or hinder the operations of the national government. A different rule, as has been well said, 'would remove from the reach of State taxation all the property of every agent of the government. Every corporation engaged in the transportation of the mails or of government property of every description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption,' and the effect would be to embarrass and injure the State to the benefit of individuals rather than of the nation."

Applying these well-established principles to the case at bar, in what way does the imposition of this tax "interfere with or impair" the efficiency of the operations of the system of bankruptcy which Congress has adopted? It places no burden upon any of the agencies which the government has chosen to effect its purpose; its only effect is to cause this property, which is still a part of the property within the State's borders and under its protection, to bear its reasonable and proper share of the burdens of the State government. Is it

reasonable to extend a doctrine which, as Justice Miller says, is "founded alone in the necessity of securing to the Government of the United States the means of enforcing its legitimate powers" to such a case as this? We think not.

By the same section of the Constitution which gives power to Congress to adopt uniform bankruptcy laws, like powers are conferred upon that body to control interstate commerce, and exemption from State taxation has been sought by corporations engaged in such traffic, the same doctrine being urged as is here invoked.

Applying the principles above enumerated, the courts have uniformly refused to entertain such contentions. The Supreme Court of the United States has consistently upheld the taxing power of the State. It says, in Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18: —

> "No general principles of law are better settled and more fundamental than that the legislative power of every State extends to all property within its borders."

Railroads engaged in handling interstate business have sought to escape State taxation, but the Supreme Court has held that, although they were government agencies, their property was taxable as property within the State.

In Thompson v. Pacific R. R. Co., 9 Wall. 579, a railroad organized under an act of Congress was taxed by the State, and the tax was upheld.

In Railroad Company v. Penniston, 18 Wall. 5,

the franchise was granted by Federal statute, and still the State was allowed to levy its regular taxes against it, the court saying: —

> "It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operation is a direct obstruction to the exercise of Federal powers."

See, also, R. R. Co. v. California, 162 U. S. 91–125.

Telegraph companies have sought the same exemption upon the same ground, but the Supreme Court has held that the fact that the company is engaged in interstate commerce, or that it is an agent of the government, can afford no immunity from the taxation of its property. In Western Union Telegraph Co. v. Gottlieb, 190 U. S. 425, Mr. Justice McKenna says: —

> "These cases (Western Union Tel. Co. v. Massachusetts, 125 U. S. 530; Massachusetts v. Western Union Tel. Co., 141 U. S. 40 and

> others) establish that in estimating the value of the property of a telegraph company situate within a State it may be regarded not abstractly or strictly locally but as a part of a system operated in other States, and that the State was not precluded from taxing the property because the State had not created the company or conferred franchise upon it, or because it derived rights or privileges under the act of July, 1866, or was engaged in interstate commerce."

By the Constitution of the United States, treaties are declared the supreme law of the land; yet it has been held in Prevost v. Grenoux, 19 Howard 1, that treaties cannot control the State in its taxation of the subjects of taxation within its jurisdiction.

We believe, therefore, that the State has a right to impose this tax in the absence at least of a prohibition by Congress.

An examination of the bankruptcy law will at once reveal that there is absolutely nothing in the law which prohibits the imposition of State taxes pending administration; there is no express exemption of the assets of bankrupt estates from State taxation during administration. This exemption will never be presumed. As Judge Caldwell said in his opinion in the case at bar: —

> "Exemption from taxation is never presumed. The legislative intent to exempt property from taxation must be clearly and explicitly expressed."

21753

The editor of Cooley on Taxation (3d Ed.), p. 356, says: —

> "As taxation is the rule and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms. It cannot be taken to have been intended when the language of the statute on which it depends is doubtful and uncertain."

Taxation is a sovereign right and it will not be presumed that the legislature intended to divest a State of that right without express words showing the intent. As Mr. Justice Clifford says, in United States v. Herron, 87 U. S. 251, l. c. 263: —

> "It is a maxim of the common-law, said Savage, C. J., that when an act of Parliament is passed for the public good, as for the advancement of religion and justice, or to prevent injury and wrong, the king shall be bound by such act though not named, but when a statute is general and any prerogative, right, title or interest would be divested or taken from the king, in such a case, he shall not be bound unless the statute is made by express words to extend to him; for which he cites both English and American authorities, and adds that the people of the State being sovereign have succeeded to the rights of the former sovereign, and that the people of the State are not bound by the general words in the insolvent law.
>
> Sanctioned as that principle is by two express decisions of this court, it would seem that further discussion of it is unnecessary as it has never been questioned by any well

> considered case, State or Federal, and is founded in the presumption that the legislature, if they intended to divest the sovereign power of any right, privilege, title or interest, would say so in express words; and where the act contains no words to express such an intent, that it will be presumed that the intent does not exist. * * * Nor does the bankrupt act impair or supersede the laws for the collection of taxes and that rule also is founded upon the same canon of construction, to wit, that the crown is not bound by the bankrupt laws."

The district judge in deciding the case of In re Sims, 118 F. R. 356; 9 A. B. R. 162, says: —

> "It is difficult to perceive why the primary right of the taxing authority should be denied. A tax is a debt due to government. The levying and collection of such tax is, within the relative scope of existing authority, an exercise of sovereignty, and nothing will be presumed against such sovereign rights. It would have been easily competent for Congress in enacting a uniform system of bankruptcy, to have declared that funds held in process of litigation and for the purpose of distribution should not be taxed; but it has not done this."

The United States courts have refused to recognize discharges in bankruptcy as barring certain claims of the State governments, on the ground that not being explicitly mentioned, the sovereign is not included in the bar. In the case of In re Moore, 111 F. R. 145, l. c. 150, the court, says: —

"Judgments such as the one proved in this case may possibly appear to come within the letter of the statute; but nevertheless, as neither State nor national government is mentioned in the act in this connection, I am persuaded that its operations cannot properly be held to embrace judgments imposed in executing the public criminal law. * * * While in its broadest interpretation this general principle might be considered as applying only to the sovereignty which enacted the statute, still in our dual form of government, and in view of the considerations already suggested, and of an obvious public policy, I think it is clear that the operation of the principle must be so extended as also to exclude the States of the Union when Congress enacts the legislation, and that it should be held in the case before us that Congress did not mean to include within the operations of the bankrupt act fines imposed in executing the criminal laws of a State because it did not expressly legislate to the effect that such fines were dischargeable."

In the case of In re Baker, 96 F. R. 954, l. c. 957, the court said: —

"If Congress had intended that the bankrupt's discharge should operate as a release of his debts owing to the government, it would undoubtedly have so provided in unmistakable terms, especially in view of the rule of construction, which has been established and so uniformly followed for so many years."

In Johnson v. Auditor, 78 Ky. 282, l. c. 285, the court says: —

> "The recognized rule is that the authority of the sovereign is not bound by the words of a statute, unless named therein, if the statute tends to restrain or diminish the powers, rights, or interest of the sovereign."

In Commonwealth v. Hutchinson, 10 Penn. 466 (cited with approval in United States v. Herron, *supra*), the court said: —

> "The same point is ruled under the bankrupt act of the 4th April, 1800, in the United States v. King, Walla. R. 12. It is there decided that debts due to the United States are not barred by a bankrupt certificate. The reason is that the king is not bound because he is not named — a reason equally applicable to the United States, and to the commonwealth which is within its sphere a sovereign State."

If it was the intent of Congress to prohibit the imposition of these taxes, why did it not so provide in express terms? Since it did not it must be presumed that it did not intend any such inhibition.

But the law itself, we think, recognizes the State's rights. It is true that paragraph *a* of section 64 of the act provides for payment only of taxes "legally due and owing by the bankrupt;" this, however, shows that claims for State taxes are considered as "highly meritorious." What consistency would there be in Congress *preferring* a claim for State taxes which accrued prior to bankruptcy and *prohibiting* the imposition of all taxes after

bankruptcy and pending administration? The Supreme Court of the State of Missouri, in construing a very similar provision of the administration law of the State, which provided for classification of "taxes due the State, etc.," held that the word "due" applied as well to taxes to become due as those which were due at the time of the death of decedent.

State ex rel. v. Tittmann, 103 Mo. 553.

Moreover, section 64*b* of the act provides for the payment in full of "the actual and necessary cost of preserving the estate subsequent to filing the petition." It would seem but right to say that the tribute paid to the State and municipal government which protects the property of the bankrupt estate should be considered a necessary cost of preserving the estate. The Referee in deciding the case appears to have considered the authority of this paragraph sufficient. He says (Transcript, pp. 3-4):—

> "While section 64*a* of the bankrupt law seems to relate solely to taxes 'due and owing by the bankrupt' prior to bankruptcy, section 64*b* provides for the payment in full out of the bankrupt estate of the 'actual and necessary costs of preserving the estate subseqeunt to filing the petition.' The latter provision is of a very comprehensive character, and was unquestionably intended to provide for the payment of all proper expenses and charges incident to the continued existence and preservation of the assets of the estate. Property in the hands

> of a trustee in bankruptcy is embraced within the terms of the State statutes imposing taxes, and I can see nothing in the policy or purpose of the bankrupt law which would justify the conclusion that Congress intended that such property should be held exempt from the burden of State taxation."

We believe, further, that the Court of Bankruptcy should, acting under its general equity powers, recognize the justice of the State's claim to priority. Courts of bankruptcy are, by the bankruptcy law, given equity powers, and it has always been recognized that the general rules of equity are to govern the administration of bankruptcy laws. Indeed, a suit in bankruptcy is considered an action in equity. (See Bardes v. Bank, 178 U. S. 524.) The Supreme Court of Missouri has held, in State to use v. Rowse, 49 Mo. 586, that the State's right to priority exists independent of statutory lien; that, "by the common law, all debts due the crown were preferred to claims of private citizens; so far as taxes are concerned, every consideration requires that this rule be regularly observed;" and this decision is cited with approval in Greeley v. Bank, 98 Mo. 458, and State ex rel. v. Tittman, 103 Mo. 553.

It is in the exercise of this equity power that, where title is vested in receivers, courts order payment of State taxes upon property held by the receiver. (See Ex parte Chamberlain, 55 F. R. 704–706; Central Trust Co. v. Railroad, 110 N. Y. 250.

III.

It remains to consider the decided cases in which the question has arisen. It is significant that with one exception, — a decision by a Referee under the law of 1867 — all of the decisions sustain the power of the State to impose the tax.

The case of In re Mitchell, 16 N. B. R. 535; F. C. No. 9658, was decided under the law of 1867. The court decided the question on general principles, independent of the provision of the law which permitted it, and his reasoning is therefore applicable to this case. He says: —

> "The first ground taken by the assignees is that they are officers of the court; that the fund in their hands is in the custody of the law, and therefore not to be disturbed or interfered with by any action on behalf of the State. An able opinion of this purport has been given by one of the registers. (In re Booth.) I cannot subscribe to that opinion. I cannot see any interference or obstruction of the court, or of the law, in taxing to the owner thereof any fund that may happen to be, in whole or partly, in the registry of the court, or under its direction, as was the case with the money here provided. There is no attempt to affix upon it a lien, or in some way disturb the actual custody of the fund. Such an assessment is simply an official declaration that the owner of the fund should pay his share of the public burdens."

In re Booth, F. C. No. 1645, was decided by a register in bankruptcy, also without reference to the

special provision to the law of 1867 allowing assessment of State taxes. This opinion preceded that of Judge Lowell in the Mitchell case, and was considered by Judge Lowell in deciding that case. The register's conclusion is exactly the opposite of those reached by Judge Lowell.

In the case of In re Conhaim, 100 F. R. 268, 4 A. B. R. 58, Judge Hanford says: —

> "The bankruptcy law very justly requires the trustee of a bankrupt estate to pay all taxes legally due and owing by the bankrupt, and the court will not favor any evasion of this law by giving a too literal construction to those words. The manifest intent of the law is that while the estate is in the hands of the trustee his custody shall not constitute a barrier to prevent the collection of taxes which would be collectible under the law if the property had remained in the possession and control of the bankrupt himself."

While the taxes in question were taxes due by the bankrupt, it is evident that the court was of the opinion that possession of property by a trustee should not interfere either with the assessment or collection of taxes.

In the case of In re Keller, 109 F. R. 131; 6 A. B. R. 351, the date of adjudication was December 24, 1900; the trustee was appointed January 7th, 1901. The Iowa statutes provided that property should be listed and assessed against the owner on January 1st of each year for the taxes for ensuing year. The property of the bankrupt was sold Feb-

ruary 12th, 1901, by order, free and clear of all liens; then the State put in its claim for taxes and the question arose whether they should be allowed and if so by whom paid. Now, by Section 70*a* of the bankruptcy law, title to the property of the bankrupt vests in the trustee *as of the date of bankruptcy*. See also In re Annie De Etta Pease, 4 A. B. R. 578; In re Burke, 5 A. B. R. 12. As that adjudication was on December 24th, it would seem that assessment against any person other than the trustee would have been invalid.

The property was certainly in the custody of the bankrupt court after adjudication, and was in process of administration on January 1, 1901, whether the title was in the trustee or not. Taxes assessed against it on January 1, 1901, were taxes assessed against property in *bankruptcy*, and such taxes were not taxes *due by the bankrupt* within the meaning contended for by appellant. The court held that the taxes should be paid, and said: —

> "There is nothing in the language or purpose of the bankruptcy act which justifies the holding that claims for taxes due the State, county or city, are not to be recognized and properly protected by the trustee. Sec. 64, already cited, makes it the duty of the trustee to pay all taxes, legally due and owing, in preference to claims of creditors; and, while it may be true (as is claimed by counsel for the trustee) that this section refers only to taxes that have been levied and are due and payable in the complete sense of those words, yet the enactment of the section shows that Congress recognized claims for taxes to be so highly meritorious that preference in pay-

ment over ordinary debts is granted thereto in the distribution of bankrupt estates. * * * If, under the circumstances, the purchaser is held to take the property free from all liability for taxes for the ensuing year, it would be upon the theory that the title acquired by the trustee in bankruptcy passes to him free from all liability for such taxes, which I can not conceive to be the intent of the act. * * * If it be held that, upon the appointment of a trustee on January 7, the title to the stock of goods vested in him as of the date of the adjudication, which was December 24, 1900, then the trustee was the owner of the goods on the 1st day of January in such sense that when called upon by the assessor, he should have listed the same for taxation."

In the case of In re Sims, 118 F. R. 356, A. A. B. R. 162, decided by the District Court for the Western District of Georgia, the court says: —

"This presents the question, are the funds in the hands of a trustee in bankruptcy liable to State and county taxation in that taxing district when the values in question might have been assessed for taxation had not bankruptcy intervened. * * * Upon principle, however, it seems that the application of the tax collector must be granted. Sec. 64*a* of the act provides: (quoting the section). It is manifest from this provision of the act that Congress had no purpose to deny to the taxing power any valid claim for taxation upon the values in the hands of officials of a court of bankruptcy. On the contrary it was the purpose of Congress to make it obligatory that all the current taxes legally due should be paid. It is true that the act does not expressly provide that funds held

by officers of court pending the litigation shall be liable to taxation. Under the general principle, however, that taxation should be uniform upon all values it is difficult to perceive why the primary right of the taxing authority, whether national, State or municipal, should be denied. A tax is a debt due to government. The levying and collection of such tax is, within the relative scope of existing authority, an exercise of sovereignty, and nothing will be presumed against such sovereign right. It would have been easily competent for Congress in enacting a uniform system of bankruptcy, to have declared that funds held in process of litigation and for the purpose of distribution should not be taxed; but it has not done this. Much light is thrown upon this important inquiry by the decision of the Supreme Court of the United States in U. S. v. Herron, 20 Wall. 251–264; 22 L. Ed. 275. The precise question was not involved but Justice Clifford for the court, quotes with approval the language of Chitty to the effect that:

"'Acts of Parliament which would devest or abridge the king of his prerogatives, his interest, or his remedies in the slightest degree do not, in general, extend to or bind the king, unless there be express words to that effect.'

"In the same opinion we are advised that the framework of the bankruptcy legislation of this country is largely taken from the various acts of Parliament, and 'such acts,' said the learned justice, 'have never in terms, included debts due to the sovereign of the country; and the decisions of the courts of Wesminster Hall for more than a century have held without exception that such acts, or the proceedings under the same, do not discharge debts due to the crown.' The learned justice continued:—

> " ' Nor does the bankruptcy act impair or supersede the laws for the collection of taxes, and that rule also is founded upon the same canon of construction, to wit, that the crown is not bound by the bankruptcy laws; and therefore, says Shellford, on p. 303, the appointment of assignees does not relate to the act of bankruptcy as against the crown process but the bankrupts' personal property is bound under an extent even when tested subsequently to the appointment of the assignees.'
>
> " Here of course the taxing power stands in the place of the sovereign, and the trustee in the place of the assignees."

These cases with the cases at bar constitute the only judicial determinations we have been able to find covering the question at issue.

We do not understand that appellant seriously contends that the fact that some time elapses between the date on which a tax becomes fixed and the date of payment thereof could furnish a basis for denying the State's right to those taxes. That is but a slight administrative difficulty, one which is surmounted every day by administrators, executors, curators, guardians and trustees in this State. It does not in any way affect the validity of the tax.

We respectfully submit that no error was committed by the Circuit Court of Appeals in affirming the decree of the lower court.

Respectfully submitted,

HERBERT R. MARLATT,
Attorney for Appellee.

GEORGE S. JOHNSON,
CHARLES A. HOUTS,
HARRY B. HAWES,
Of Counsel.

Supreme Court of the United States.

No. 238.—October Term, 1903.

Solomon L. Swarts, Trustee in Bankruptcy of Siegel-Hillman Dry Goods Company, Appellant,
vs.
L. F. Hammer, Jr., Collector of the Revenues of The City of St. Louis, Missouri.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[May 16, 1904.]

Mr. Justice McKenna delivered the opinion of the Court.

The case involves the validity of taxes imposed upon property in the hands of a trustee in bankruptcy.

The appellant was duly elected and qualified as trustee of the estate of Siegel-Hillman Dry Goods Company, which had been adjudged a bankrupt. The appellant as such trustee had in his hands and on deposit in the designated depository the sum of $68,320, belonging to the estate. The appellee, as collector of the revenue of the city of St. Louis, Missouri, filed before the referee a petition alleging State, school and city taxes for the year 1901 had been regularly assessed against said sum on the first of June, 1900, and that a bill for said taxes, properly certified, had been delivered to him for collection, and prayed for an order directing the taxes to be paid. The trustee filed an answer denying the liability of the property to the taxes. After hearing, the referee made an order directing the appellant to pay to appellee the sum of $1,298.08, the amount of the tax bill for the year 1901, "together with the accrued penalties and fees provided by law."

The order was affirmed by the District Court as to the amount of taxes, but disapproved as to accrued penalties and fees. A decree was duly entered, which was affirmed by the Circuit Court of Appeals. (120 Fed. Rep. 256.)

The argument of appellant has taken somewhat wide range. The case, however, is in narrow compass. The question is not the extent of the power of Congress over the subject of bankruptcy, but what Congress intended by the act of 1898. By section seven of that act the title to all of the property of the bankrupt not declared to be exempt is vested in the trustee. By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing

in that to withdraw in from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt. Though the opinion of the Circuit Court of Appeals is brief, it is difficult to add anything to its conclusiveness. But, as showing the trend of judicial opinion, we may refer to *In re Conhaim*, (100 Fed. Rep. 268;) *In re Kellaer*, (109 Fed. Rep. 131;) *In re Sims*, (118 Fed. Rep. 356.)

Decree affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.